(2)

No. 91-454

FILED
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1991

THOMAS W. DEVANEY,
Petitioner,
vs.
XEROX CORPORATION,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Was Petitioner entitled to trial by jury on the equitable cross-claim brought by Respondent for specific enforcement of a settlement agreement?

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No. 91-454

In the Supreme Court

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OCTOBER TERM, 1991

THOMAS W. DEVANEY,
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vs.
XEROX CORPORATION,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondent Xerox Corporation ("Xerox")[1] respectfully requests that this Court deny the petition of Thomas W. Devaney for a writ of certiorari because the Ninth Circuit's memorandum decision applies existing precedent to the facts of the case and presents no novel legal analysis warranting this Court's review.

THE OPINION BELOW AND THIS COURT'S JURISDICTION

Mr. Devaney seeks review of the Ninth Circuit's unpublished memorandum decision in *Xerox Corp. v. Devaney*, CA No. 89-55982 (9th Cir. 1991) (mem. op.), filed on

[1]Pursuant to Supreme Court Rule 29.1, a list naming all parent companies and subsidiaries (except wholly owned subsidiaries) of Xerox is attached as Appendix A to this brief.

April 12, 1991. Mr. Devaney's petition for rehearing was denied on June 25, 1991. Mr. Devaney then filed a petition with this Court for a writ of certiorari on September 16, 1991. This Court has jurisdiction over the petition pursuant to 28 U.S.C. § 1254(1). The petition is timely under 28 U.S.C. § 2101(c) and Supreme Court Rule 13.1.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Seventh Amendment:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Federal Rules of Civil Procedure, Rule 38(a):

(a) **Right Preserved.** The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

Federal Rules of Civil Procedure, Rule 39(a):

(a) **By Jury.** When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States.

STATEMENT OF THE CASE

Mr. Devaney's petition challenges the memorandum decision of the Ninth Circuit Court of Appeals, which affirmed the trial court's denial of a jury trial in an equitable action for specific performance of a settlement agreement. Contrary to the position asserted by Mr. Devaney in his petition, Xerox's cross-claim for specific enforcement was not "joined" to any other claim, and there was no prayer for damages.

The underlying (settled) case concerned the July, 1986 purchase by Comdisco, Inc., a computer leasing company, of 534 document facsimile transmission systems from Ladd Cameron, one of Mr. Devaney's agents, and the simultaneous lease of these systems by Comdisco to a partnership controlled by Mr. Devaney. Comdisco wired $3,249,000 to a bank account jointly held by Devaney and Cameron. On the next day, Devaney wrote a $2,400,000 check to a corporation controlled by him. That money has never been recovered. Comdisco's subsequent investigation revealed that Cameron ordered over $1,200,000 of computer hardware and facsimile units from Xerox, that he paid Xerox only $600,000, and that the 534 document facsimile transmission systems which Comdisco thought it had bought had never existed. Comdisco filed suit against Devaney, Cameron, and Devaney's companies for fraud and breach of contract. In a third amended complaint filed over a year later, Comdisco named Xerox and a Xerox employee as defendants for allegedly assisting Devaney in his fraud.

After extensive negotiations among the parties over several months, a global settlement agreement was reached on March 17, 1989 that resolved that complex lawsuit and avoided a lengthy trial. Three days after being told that the global settlement had been approved

by all parties, Mr. Devaney reneged on his agreement to contribute to the settlement $100,000 in cash and execute and deliver a $200,000 promissory note, a deed of trust securing the note, and general releases for the benefit of the other parties. On March 22, 1989, Xerox filed an equitable action against Mr. Devaney alleging a single cross-claim for specific performance of a settlement agreement. Appendix B.

On March 28, 1989, Devaney filed a demand for jury trial. Xerox filed a motion to strike Devaney's jury de mand on the grounds that the cross-claim was an equita ble action for which no right to trial by jury existed. After reviewing the transcript of the settlement conference in which Devaney repudiated the settlement agreement, the court confirmed that no jury trial had been ordered on Xerox's cross-claim for specific performance and granted Xerox's motion in a written order filed April 28, 1989. Appendix C.

A one-day bench trial took place on June 20, 1989, in which Mr. Devaney and his lawyer testified. At the end of the trial, the Court determined that the settlement was just and fair as to Mr. Devaney and ordered specific performance of the settlement agreement.

REASONS WHY REVIEW SHOULD BE DENIED

Devaney's petition should be denied because the Ninth Circuit's memorandum decision follows existing precedent in the Ninth Circuit and other circuits and does not present an important question of federal law unresolved by this Court.

An action for specific performance of a contract lies in equity. *King v. Hamilton*, 29 U.S. (4 Pet.) 311, 7 L.Ed. 869 (1830). The circuits are in agreement that there is no

right to trial by jury in an action for specific performance of a contract. *See e.g., Owens-Illinois, Inc. v. Lake Shore Land Co., Inc.*, 610 F.2d 1185, 1189 (3d Cir. 1979) ("An action for specific performance without a claim for damages is purely equitable and historically has always been tried to the court"); *Medtronic, Inc. v. Benda*, 689 F.2d 645, 660 (7th Cir. 1982), *cert. denied,* 459 U.S. 1106, 103 S. Ct. 731, 74 L.Ed.2d 955 (1983) (no right to jury trial in action for specific performance); *Klein v. Shell Oil Co.*, 386 F.2d 659, 663 (8th Cir. 1967) (no right to jury trial in action for specific performance).

All of the circuits that have addressed whether a right to jury trial exists in an action for specific enforcement of a settlement agreement uniformly have held that there is no such right. *See Warner v. Rossignol*, 513 F.2d 678, 683-684 (1st Cir. 1975); *Adams v. Johns-Manville Corp.*, 876 F.2d 702, 709 (9th Cir. 1989); and *Ford v. Citizens and So. Nat'l Bank*, 928 F.2d 1118, 1121-1122 (11th Cir. 1991); *see also, Read v. Baker*, 438 F. Supp. 737, 741 (1977), *aff'd*, 577 F.2d 728 (1st Cir.), *cert. denied*, 439 U.S. 869, 99 S. Ct. 197, 58 L.Ed.2d 180 (1978) (referring to the "Court's inherent power to enforce in equity a settlement agreement entered into between the parties litigant in the underlying pending case"); and *Kukla v. National Distillers Products Co.*, 483 F.2d 619, 621-622 (6th Cir. 1965) (order granting specific performance of settlement agreement remanded to trial court for evidentiary hearing).

The cases cited by Mr. Devaney in his petition do not support his assertion that a right to jury trial exists in an action for specific enforcement of a settlement agreement. In those cases, the Court affirmed the right to jury trial of legal claims *only*, whether alone or joined with an equitable claim. *See e.g., Curtis v. Loether*, 415 U.S. 189, 194, 94

S. Ct. 1005, 1008, 39 L.Ed.2d 260, 266 (1974); *Ross v. Bernhard*, 396 U.S. 531, 537-538, 90 S. Ct. 733, 738, 24 L.Ed.2d 729, 736 (1970); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 473, 82 S. Ct. 894, 897, 8 L.Ed.2d 44, 48 (1962); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510-511, 79 S. Ct. 948, 956-957, 3 L.Ed.2d 988, 997 (1959). There is no right to jury trial in an equitable action for specific performance of a settlement agreement.

CONCLUSION

Simply stated, this case is about a party who made a deal to settle a suit for fraud, "welshed" on the deal, and now has been ordered to perform his agreement. Supreme Court Rule 10 provides that "special and important reasons" are needed for a petition for a writ of certiorari to be granted, including resolving a conflict among the circuits or presenting an important question of federal law that has not been addressed by this Court. This case meets neither test. The memorandum decision in *Xerox Corp. v. Devaney* correctly applies existing precedent to the facts of the case. Xerox therefore respectfully requests that Mr. Devaney's petition for a writ of certiorari be denied.

DATED: October 11, 1991

Respectfully submitted,

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APPENDIX A

LIST OF PARENT COMPANIES AND SUBSIDIARIES

Respondent Xerox Corporation ("Xerox") has no parent company. Xerox has the following subsidiaries, excluding wholly owned subsidiaries:[2]

AMTX, Inc.
Advanced Forming Technology
Xerox Industrial e Comercial S.A.
Xerox do Nordeste S.A.
Xerox do Amazonas S.A.
Century Data Systems, Inc.
Copicentro S.A.
GESCAN International
Image Sciences, Inc.
Katun Corporation
Kurzweil Applied Intelligence
Optimem
Opto Generic Devices, Inc.
Rank Xerox Holding B.V.
Rank Xerox Investments Limited
Investissements Xerographiques Marocains S.A.
Reprographics Egypt Limited
Xerox Egypt S.A.E.
Xerox Maroc S.A.
Xerox Products Limited
R-X Holdings Limited
Xerox Shanghai Limited
Rank Xerox Limited
Fuji Xerox Co., Ltd.

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[2]This List of Parent Companies and Subsidiaries is submitted by Xerox pursuant to Supreme Court Rule 29.1.

Aichi Xerox Co., Ltd.
Aichi-Higashi Xerox Co., Ltd.
Akita Fuji OA Co., Ltd.
Chiba Xerox Co., Ltd.
Fuji System Brain Co. Ltd.
Fuji World Office Machine Co., Ltd.
Fukui Xerox Co., Ltd.
Fukuoka Xerox Co., Ltd.
Fukushima Xerox Co., Ltd.
Gifu Xerox Co., Ltd.
Gunma Xerox Co., Ltd.
Hiroshima Xerox Co., Ltd.
Hokkaido Xerox Co., Ltd.
Hokuriku Xerox Co., Ltd.
Hyogo Xerox Co., Ltd.
Ibaraki Xerox Co., Ltd.
Kagoshima Xerox Co., Ltd.
Kanagawa Xerox Co., Ltd.
Kita Kyushu Xerox Co., Ltd.
Kobas Co. Ltd.
Korea Xerox Co., Ltd.
Kumamoto Xerox Co., Ltd.
Kyoto Xerox Co., Ltd.
Mie Xerox Co., Ltd.
Miyagi Xerox Co., Ltd.
Nagano Xerox Co., Ltd.
Nagaski Xerox Co., Ltd.
Niigata Xerox Co., Ltd.
Okayama Xerox Co., Ltd.
Oita Xerox Co. Ltd.
Okinawa Xerox Co. Ltd.
Osaka Xerox Co., Ltd.
Philippine Fuji Xerox Corp.
Protex Co. Ltd.
Saitama Xerox Co., Ltd.

Sakanao Office Machine Co. Ltd.
SCAN C2C Inc.
Shikoku Xerox Co., Ltd.
Shizuoka Xerox Co., Ltd.
Taiwan Fuji Xerox Corp.
Tama Xerox Co., Ltd.
Technol Co. Ltd.
Thai Xerographic Systems Co., Ltd.
Tochigi Xerox Co., Ltd.
Tokyo Xerox Co., Ltd.
Unisol Inc.
Wakayama Xerox Co. Ltd.
Indian Xerographic Systems Limited
Modi Xerox Limited
Epitec AB
Arguelles
Barcelona Inteligencia Art
Bonanova
Cantabria
Castellon
Castilla Y La Rioja
Cia. Espanola Repro y Serv.
C.L.I.A. S.A.
Cuidad Lineal
Cuzco
Del Guadalquivir
Deusto
Ebro
Helmantica
Layetana
Les Corts
Levante
Llobregat
Los Remedios
Madrid-Sur

Malaga
Mediterraneo
Meridiana
Mestalla
Nervion
Retiro
Salamanca
Sistemas Expertas y Tecnolo
Software Inteligente y Tratemiento Elect de Imp
Vizcaya
Scaitech A/S
Xerox Partner Arhus A/S
Xerox Partner Esbjerg A/S
Xerox Partner Fyn A/S
Xerox Partner Herning A/S
Xerox Partner Horsholm A/S
Xerox Partner Nykobing A/S
Xerox Partner Trommesalen A/S
Xerox Partner Vejle A/S
Asunto Oy Kristiinanvalli
Rank Xerox (Nigeria) Limited
Rank Xerox Portugal Equipamentos de Escritorio, Limitada
Rank Xerox Noleggi SpA
Artificial Intelligence Limited
Badger Office Equipment
Channel Office Systems Limited
Coles Office Equipment Limited
Humberside Business Products Limited
Kernal Technology Limited
Oakley Office Equipment Limited (in liquidation)
SBS Ltd.
Sussex Office Services Limited

Text-Comm Limited
ACT Systemes S.A.
Aqix Sarl
Alsatique
Ardennes Marne Bureatique
Axes Bureautiques Systemes
Axor Bureautique
Axis International
BSC Arve
Bureau Equip'Mans
Bureautique 64
Bureautique 66
Bureautique Distribution
Burobail S.A.
Burocom 42
Burofinance S.A.
C2B Cazaban
C2R Bureautique
Centre Bureautique 49
Centre Bureautique Auvergne
Centre Bureautique Informatique
C K Bureautique
Competence Bureautique
Diffusion Bureautique de la Somme
Espace Bureautique
Franche Comte Bureautique
Informatique Bureautique Charente
Informel SARL
L.A. Bureautique
Nimes Bureautique Communication
RSL Developpement SARL
Omicrome S.A.
Societe Industrielle Rank Xerox S.A.
Secob
Sodevco

Vaucluse Bureautique Service
Vienne Partenaire Bureautique
Selectronics, Inc.
Spectra Diode Laboratories, Inc.
The Genra Group, Inc.
Verbex Voice Systems, Inc.
Xerox de Bolivia Limitada
Xerox Canada Inc.
Teletech Financial Corporation
Xerox Canada Ltd.
Xerox de Colombia S.A.
Compucolsa S.A.
Xerox de El Salvador, S.A. de C.V.
MCM Asia Pacific Company Limited
Xerox Financial Services Life Insurance Company
Xerox de Honduras, S.A.
Avalanche Development Company
Xerox Canada Realty, Inc.
Xerox (Jamaica) Limited
Xerox de Panama, S.A.
Xerox del Peru, S.A.
Xerox Trinidad Limited
Xerox Zona Libre, S.A.

APPENDIX B

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CIVIL NO. 86-7751-WDK (Gx)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

COMDISCO, INC., a Delaware corporation,
Plaintiff,
v.
THOMAS W. DEVANEY, *et al.*,
Defendants;

XEROX CORPORATION, a New York corporation,
Cross-Complainant,
v.
THOMAS W. DEVANEY,
Cross-Defendant;

AND RELATED CROSS-ACTION.

CROSS-CLAIM FOR SPECIFIC PERFORMANCE OF SETTLEMENT AGREEMENT

Xerox Corporation ("Xerox"), a New York corporation, for its cross-claim against cross-defendant Thomas W. Devaney ("Devaney") alleges as follows:

CROSS-CLAIM
(Specific Performance of Settlement Agreement)

1. Xerox was and now is a New York corporation duly organized and existing under and by virtue of the laws of the State of New York with its principal place of business in Stamford, Connecticut.

2. Xerox is informed and believes that Devaney is, and at all times mentioned herein was, an individual residing in Los Angeles, California and a citizen of California.

3. This Court has jurisdiction of the subject matter of this action pursuant to 28 U.S.C. § 1332 in that the matter in controversy exceeds the value of $10,000, exclusive of interest and costs, and is between citizens of different States, and venue exists in this judicial district pursuant to 28 U.S.C. § 1391 in that the claim asserted herein arose in this judicial district and the cross-claimant and cross-defendant reside or do business therein.

4. On or about March 8, 1988, Xerox and Devaney entered into an oral agreement in Los Angeles, California whereby Devaney agreed, contingent only on and as part of a global settlement of the principal action brought by plaintiff Comdisco, Inc. ("Comdisco"), to pay to Xerox $300,000 as follows: $100,000 on or before April 15, 1989 and $200,000 pursuant to a promissory note in the amount of $200,000 payable to the order of Xerox Corporation over three years at 12% interest and secured by a deed of trust on Mr. Devaney's personal residence. Devaney further agreed to exchange releases with Comdisco, Xerox, its employee, Reginald St. Claire, and the other settling defendants. In return, Xerox agreed to meet with representatives of Comdisco and attempt to reach a suitable global settlement in which Comdisco would dismiss with prejudice all claims in this case against all defendants

therein, including Devaney, and all settling defendants would execute appropriate general releases in favor of Devaney and certain other settling defendants.

5. On March 9, 1989 in reliance on Mr. Devaney's agreement, Xerox negotiated a global settlement agreement with Comdisco in which Xerox agreed to pay $1,875,000 to Comdisco on certain terms and Comdisco agreed to dismiss with prejudice its lawsuit against all defendants, including Devaney.

6. On or about March 17, 1989, Xerox and Comdisco entered into the global settlement negotiated on March 9, 1989. Counsel for Xerox notified Mr. Devaney's counsel on March 17, 1989 that the proposed settlement was approved by Xerox and Comdisco.

7. On or about March 20, 1989, Devaney's counsel telephoned Xerox's counsel and stated that Devaney had withdrawn his "offer" and would not make any of the payments to Xerox that he previously agreed to make as part of the global settlement.

8. The value of the consideration to Devaney of dismissal with prejudice of Comdisco's claims against Devaney and releases in favor of Devaney by all settling parties was not less than the value of the payments Devaney agreed to make to Xerox, and the agreement between Xerox and Devaney is just and reasonable as to Devaney.

9. Xerox has performed all conditions, covenants and promises required by it to be performed in accordance with the terms and conditions of its agreement with Devaney, except execution and delivery of its release in favor of Devaney, which Xerox is excused from delivering by Devaney's anticipatory repudiation of his obligation to pay Xerox $300,000.00. Xerox stands ready, willing, and

able to perform all of its obligations to Devaney under its agreement with him.

10. Xerox has no adequate legal remedy for Devaney's breach, because monetary damages, if awarded, would be inadequate compensation for Devaney's refusal to make the promised payments to Xerox and to execute and deliver appropriate general releases to Xerox and all other settling defendants as agreed.

WHEREFORE, Xerox prays for judgment as follows:

1. That Devaney be ordered to pay Xerox $300,000 and to execute and deliver a general release in favor of Xerox and Reginald St. Claire or, in the alternative, to pay to Xerox $100,000 on or before April 17, 1989 and to execute and deliver on or before April 17, 1989 (A) a promissory note in form and substance reasonably satisfactory to Xerox in the amount of $200,000 payable to the order of Xerox Corporation at 12% per annum over three years, (B) a deed of trust on Devaney's personal residence in form and substance reasonably satisfactory to Xerox in order to secure performance of his obligations under such promissory note, and (C) a general release in form and substance reasonably satisfactory to Xerox in favor of Xerox and Reginald St. Claire;

2. For interest thereon from the date of breach at the highest rate permitted by law;

3. For Xerox's costs of suit and its attorneys' fees incurred herein; and

4. For such other and further relief as the court may deed proper.

DATED: March 22, 1989

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APPENDIX C

No. CV 86-7757-WDK

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES — GENERAL

Date 4/28/89

COMDISCO, INC. v. THOMAS W. DEVANEY, et al.

PRESENT: HON. WILLIAM D. KELLER, JUDGE; SARA WONG, DEPUTY CLERK.

ATTORNEYS PRESENT FOR PLAINTIFFS: NONE PRESENT; ATTORNEYS PRESENT FOR DEFENDANTS: NONE PRESENT.

PROCEEDINGS: This matter is before the Court on cross-claimant Xerox Corporation's motion to strike cross-defendant Devaney's demand for a jury trial. Xerox Corporation's cross-claim is for specific performance of a settlement agreement.

The seventh amendment preserves the right to a jury trial as it existed at common law. U.S. Const. amend. VII. There is no right to a jury at common law in a purely equitable action. *Medtronic, Inc. v. Benda*, 689 F.2d 645, 660 (7th Cir. 1982), *cert. denied*, 459 U.S. 1106 (1983). An action for specific performance without damages, such as the cross-claim asserted here, is purely equitable. *Owens-Illinois, Inc. v. Lake Shore Land Co., Inc.*, 610 F.2d 1185, 1189 (3d Cir. 1979). As a result, cross-defendant Devaney has no right to a jury trial in the cross-action. The Court hereby STRIKES cross-defendant Devaney's demand for a jury trial in the cross-claim for specific performance of the settlement agreement.

After examining the transcript of the March 21, 1989 hearing, the Court concludes that cross-defendant had a

good faith belief that the Court ordered a jury pursuant to Fed. R. Civ. P. 39(b). Although no such order was made by the Court, there was sufficient ambiguity in the Court's statements to warrant such a belief. For the foregoing reasons, cross-claimant Xerox Corporation's request for sanctions is hereby DENIED.

cc: counsel of record